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No. 08-603

Supreme Court, U.S.
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In The
Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

SUPPLEMENTAL BRIEF OF PETITIONER

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PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Certiorari should be granted to resolve the direct conflict between the decision below and the North Dakota Supreme Court as well as to resolve the uncertainty for states that results from the United States' recent and abrupt change in position. The law, as construed by the court below and the United States, creates a gaping loophole in the Medicaid Act allowing and encouraging the sheltering of assets for the benefit of private heirs instead of being available to decrease public spending.

A. The Decision Below Is In Direct Conflict With North Dakota On The Same Federal Question.

As demonstrated in the Petition, the Minnesota Supreme Court's decision directly conflicts with the North Dakota Supreme Court's decision in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). The United States' claim that any conflict is only about state law misreads the North Dakota court's opinion.

1. The United States' reasoning relies on a passing statement in *Wirtz* that is not the holding. U.S. Br. 13-14. The North Dakota court clearly identified its holding by stating that "[w]e *hold* [that] any assets *conveyed* by Clarence Wirtz to Verna Wirtz *before Clarence Wirtz's death* . . . are subject to the department's recovery claim." 607 N.W.2d at 886 ¶14

(emphasis added). Nothing in that court's discussion suggests, as the United States claims, that the recipient spouse had a state-law interest at the time of death. Indeed, the court explicitly states that federal law allows recovery from an asset in which the recipient "*once* held an interest." *Id.* (emphasis added). That interpretation of federal law is the exact opposite of the decision below. *Compare id. with* Pet. 37a ("To be recoverable, the asset must have been subject to an interest of the Medicaid recipient at the time of her death.").

2. The United States asserts that the North Dakota court "appeared to conclude that the recipient in that case, despite formal conveyance of certain assets before death, *retained* an interest in the relevant property until his death, when the interest was conveyed to his spouse through 'other arrangement.'" U.S. Br. 14 (emphasis added). That assertion is unsupported by the *Wirtz* decision. The court specifically *rejected* the state's arguments contending that the recipient had *retained* various equitable interests that were present at his time of death. 607 N.W.2d at 883 ¶4 (stating "[w]e disagree with both parties' arguments").

Instead, the court reasoned that if the recipient had *once* had an ownership interest but had transferred that interest during his lifetime, then the transfer was an "other arrangement." It reasoned that "other arrangement" must be interpreted broadly to include lifetime transfers because Congress intended "to allow states a wide latitude in

seeking Medicaid benefit recoveries." *Id.* at 885-86 ¶13.

3. The United States suggests that, assuming there is a conflict, the North Dakota court might consider its new interpretation. U.S. Br. 15. However, it has not issued formal guidance and does not state that it intends to. *See* U.S. Br. 12. In addition, it is highly unlikely that North Dakota will disturb a nine-year old precedent. Speculation that differences will thus be "work[ed] . . . out" is unwarranted.

B. The United States' Construction Gives No Effect To The Statutory Definition Of "Assets."

In this case, and many others, the couple's single largest asset, their home, was sheltered from recovery through the recipient spouse's simple lifetime transfer of her formal interest. Such a transfer is not penalized only because it is between spouses. That loophole is well-known and often exploited. *See* Pet. 29-30. Although Congress chose not to require states to counteract that loophole, it did not prohibit states like Minnesota from choosing to doing so.

1. Explicit statutory definitions control the interpretation and application of statutory terms. *Burgess v. United States*, __ U.S. ___, 128 S.Ct. 1572, 1577 (2008). The unusual case where a definitional statute need not be followed is where doing so produces a "manifest incongruity" that will "destroy one of the major purposes" of the particular provision

containing the defined term. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). Here, applying Congress's declared scope of the term "assets" as allowing states to reach those assets of the individual and of the individual's spouse does not result in manifest incongruity or destroy a purpose of the statute.

The statutory definition of "assets" contains three dimensions. 42 U.S.C. § 1396p(e)(1) (2006). First, "assets" identifies the nuts and bolts of the term as "all income and resources," of which only resources is relevant during post-death benefit recovery. "Resources" is further defined to include a couple's home. 42 U.S.C. § 1396p(e)(5). Second, "assets" identifies whose resources Congress intended to reach: those "of the individual and of the individual's spouse." The scope thus given to the term recognizes what this Court has also recognized: that "spouses typically possess assets and income jointly and bear financial responsibility for each other." *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002). Third, the "assets" definition declares that the term even encompasses a resource to which the individual or her spouse is entitled but does not receive because they have taken an action to make the resource technically unavailable. 42 U.S.C. § 1396p(e)(1)(A)-(C).

2. In this case, Petitioner's construction is consistent with and gives effect to all three dimensions. Francis Barg's probate estate contained the couple's resources, specifically their home. Although the home and other resources were in his name alone, they

were undisputedly marital property and even formerly jointly owned with Dolores Barg. Finally, Dolores Barg's lifetime transfer was an action that divested her interest to which she was otherwise entitled and thus was an action to make that resource technically unavailable to pay for her cost-of-care after her death. In contrast, the construction of the United States and the court below give no effect to the statutory definition and thus allow the lifetime transfer to forever exclude resources from later recovery.

The United States erroneously contends that applying the definitional statute makes the statute say "the opposite of what it says." U.S. Br. 10. Because Congress used the definitional statute to include a spouse's resources and to reach a resource the individual acted to make technically unavailable, Congress intended to allow states to pierce the veil of paper ownership arrangements. This allowance ensures, after both spouses have died, that states can choose to impose liability on an asset that would have been titled in the recipient spouse's name at her death except for a lifetime transfer designed only to shelter that asset from recovery.

C. Medicaid's Purpose Is For Assets To Be Used For A Couple's Care And Support Before Going To Heirs.

1. The United States claims that three other Medicaid provisions illustrate that the Act "imposes

significant limitations" on the principle that "spouses are expected to support each other." U.S. Br. 11. However, those provisions all illustrate Petitioner's contention that during a couple's lifetime, Medicaid requires them to use their assets for only one of two purposes: to care for the sick spouse or to support the community spouse. Those purposes are served by Petitioner's construction which is consistent with the Medicaid Act. Pet. 27 n.7. The purpose served by the United States' construction is only to subsidize inheritances at public expense.

The first provision is the exemption of a couple's home from eligibility calculations. That exemption is only effective when the community spouse *continues* to reside in the home. 42 U.S.C. § 1396p(a)(1)(B) and (2)(A) (2006). Once the individual is not reasonably expected to be able to return to the home and the spouse ceases residing in the home, a lien may be imposed to recover the benefits upon the sale or transfer of the home. *Id.* Moreover, Congress specifically made the exemption of the home inapplicable in the case of an institutionalized individual for purposes of the definition of "assets" in section 1396p. 42 U.S.C. § 1396p(e)(1) (defining "assets" as including the resources of both spouses), and § 1396p(e)(5) (defining "resources" as having the meaning in section 1382b but "without regard (in the case of an institutionalized individual) to the exclusion [of the home]" in that section).

The second provision is the ability of the community spouse to retain some resources after their

spouse is eligible for Medicaid. U.S. Br. 11. That provision is also limited to supporting the community spouse during his lifetime, not to also benefitting the couple's heirs. 42 U.S.C. § 1396r-5(f)(1) (allowing transfer of resources "only to the extent the resources are transferred to (or for the sole benefit of) the community spouse.").

The third provision states that "[d]uring the continuous period in which an institutionalized spouse is in an institution" and after the institutionalized spouse is eligible for Medicaid benefits, "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. § 1396r-5(c)(4). Again, the provision is limited to the spouse's lifetime for the specific purpose of providing support.

The eligibility provisions and their limitations fit the eligibility context when the spouses are alive, but are irrelevant in the recovery context when the spouses are dead. They were never intended to allow a couple's assets to be permanently unavailable. That is precisely what the Government reported to Congress shortly after their enactment. Its report stated that

> Federal rules permitting certain transfers of assets (e.g., transfer of the home to the spouse as authorized in MCCA) convey the clear impression that the purpose is not to place the asset permanently beyond reach of government claim but to ensure that the spouse, dependent child, and other specified persons can have use of the asset until the

> grounds for that use end (e.g., death or attainment of legal majority).

U.S. Dep't of Health & Human Servs., *Issues In Medicaid Estate Recoveries: A Report to the United States Congress* 13 (1989).

2. The United States completely ignores the asset-transfer provisions of section 1396p(c) which are the most relevant and critical to understanding Medicaid's treatment of spousal assets. Those provisions are designed to keep whatever assets a couple has from being used for anything other than care for the sick spouse and support for the community spouse. Even with the limitations noted by the United States, a community spouse is never able to freely transfer assets without a penalty being imposed on his spouse's eligibility or his own possible future eligibility. 42 U.S.C. § 1396p(c)(1)(A).

Congress created a closed system encompassing both spouses and their assets in which ownership is simply irrelevant as long as the assets stay with the spouses. The United States' construction of section 1396p(b)(4)(B) would create a glaring exception to Congress's design, and would prohibit states from recovering public expenditures from spousal assets only because the couple removed the recipient spouse's name from the asset. The Minnesota Supreme Court's holding and the United States' position are thus contrary Medicaid objectives, inconsistent with the overall Medicaid statutory scheme, and unsound

public policy. The only beneficiaries are a couple's heirs.

3. This protection of a couple's heirs is in sharp contrast to Congress's limitation of any protection of heirs to only two specific circumstances. Section 1396p(b)(2) requires delayed recovery when there is a surviving spouse, or dependent or disabled child. Section 1396p(b)(3) requires that states provide for waiver of recovery if recovery "would work an undue hardship on heirs." Thus, Congress did not intend to prohibit recovery to benefit a couple's heirs except for in those two very narrow circumstances.

D. The United States' Recent Change In Position Causes More Uncertainty.

Whereas the United States approved Minnesota's state plan provision that all spousal assets are subject to recovery regardless of ownership, it now changes its position to require that the recipient spouse owned the asset at death. *Compare* Pet. 93a *with* [U.S. Br. 12 – left over from striking the original first sentence]. U.S. Br. 12. This sudden change in position weighs in favor of granting the Petition because that change increases uncertainty for the states. Those states with existing approved state plans will be uncertain of their status. Those contemplating state plan amendments or legislation will be unsure of whether to proceed. States will wonder whether the United States will again change its position.

The United States' approval of Minnesota's state plan remains effective as there is no mechanism for it to "unapprove" a state plan based on a changed interpretation. *See* 42 C.F.R. § 430.10-.25 (2008). The already-approved state plans of North Dakota, Oregon, Indiana, and Idaho all contain similar provisions and also remain effective. Pet. 23 nn.4-5.

The United States appears to claim that its approval of Minnesota's state plan amendment was meaningless. U.S. Br. 12. It asserts that its "approval is not the equivalent of binding interpretive guidance." *Id.* The only authority it offers for that proposition is the regulation providing that a state plan amendment is deemed approved if not acted upon after ninety days. *Id.* Approval in this case, however, was an affirmative and deliberate approval, not an approval based upon inaction. Pet. 90a.

The United States' present disavowal of the importance of its own state plan approval process is the *opposite* of its position when defending its state plan disapprovals before the U.S. Court of Appeals. *E.g.*, Response Brief of Ctrs. for Medicare & Medicaid Servs., 2007 WL 2988090 at *16, in *Maryland Dep't of Health & Mental Hygiene v. Ctrs. For Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008) (contending that "the administrative process through which state plan amendments are considered . . . counsels deference."); *accord S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 (5th Cir. 2004) (concluding that CMS's "review and determination definitively

indicate whether it interprets a state plan or amendment to be in conformity with the statute"; and holding that "CMS's approval of state plans affording coverage for [particular medical care or service] demonstrates that the agency construes [the Medicaid statute] as encompassing that type of medical care or service.").

The United States asserts that it has not promulgated rules or issued formal guidance interpreting the federal statute at issue. U.S. Br. 12. It thus argues that none of its prior acts constitute an interpretation. That contradicts its prior position and holdings from various U.S. Court of Appeals circuits. *E.g.*, Response Brief of Ctrs. for Medicare & Medicaid Servs., 2007 WL 2988090 at *41, in *Maryland Dep't of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008); *Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 939 (9th Cir. 2005).

E. The United States' Changing Interpretation Demonstrates That The Statute Is, At Minimum, Ambiguous.

The United States asserts that because the federal statute "leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death" the presumption against preemption and ambiguous conditions doctrine do not apply. U.S. Br. 11-12. Yet, its own changing position is evidence that

the Medicaid statute *is* ambiguous. *Cf. Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (stating the existence of opposing interpretations by different courts makes it difficult to contend that a particular statute is unambiguous). The United States' current position stands in stark contrast to its estate recovery regulations, 42 C.F.R. § 433.36(h), the State Medicaid Manual, § 3810, and the state plan templates it requires states to use in agreeing to the express conditions accompanying receipt of Medicaid funds.

Any conditions on federal funds must be unambiguous. *South Dakota v. Dole*, 483 U.S. 203, 207. When the federal statute does not give "clear notice" to state officials that a particular condition is attached to federal funds, that condition is unenforceable. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Because a prohibition on recovery from all spousal assets remaining after the last spouse dies is not unambiguously provided, no such condition can be imposed on states when they accept Medicaid funds.

F. This Court's Review Is Necessary And Warranted.

In addition to needing to resolve the direct conflict between the court below and North Dakota, this Court should grant review to end the uncertainty in this area. States will likely be dissuaded by the decision below combined with the United States' changed interpretation from even attempting to expand their

estate recovery programs. Use of what the United States acknowledges is an important element of Medicaid may be stymied without this Court's review.[1]

Petitioner asks that this Court resolve the conflict and uncertainty by granting the petition.

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[1] Petitioner notes that Minnesota recently passed legislation, effective July 1, relating to the decision below. The legislation provides, in relevant part, that

> [a]t the time of death of a recipient spouse and solely for purpose of recovery of medical assistance benefits received, a predeceased recipient spouse shall have a legal title or interest in the undivided whole of all of the property in which the recipient and the recipient's surviving spouse owned jointly or which was marital property at any time during their marriage regardless of the form of ownership and regardless of whether it was owned or titled in the names of one or both the recipient and the recipient's spouse.

2009 Session Laws, Ch. 79 § 42. The legislation will not, however, apply to the many cases that have been stayed or otherwise placed on hold in state courts as a result of this appeal. Those cases include recovery claims totaling millions of dollars. In addition, litigation challenging the legislation is expected and likely will rely on the decision below.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Minnesota should be granted.

Respectfully submitted,

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REPLY BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Court should grant a writ of certiorari. The Minnesota Supreme Court's decision conflicts with the U.S. Secretary of Health and Human Services' interpretation of federal law. The decision below is also in direct conflict with the holding of another state supreme court.

1. Minnesota's state Medicaid plan provides that any asset *held by either or both spouses* is subject to recovery. Pet. App. 93a. The Secretary's approval of this state plan provision reflects his determination that it is consistent with federal law.

Respondent does not dispute that the decision below is in irreconcilable conflict with the Secretary's interpretation. Nor does he dispute the significance of this conflict. The Secretary determines whether states are complying with the conditions tied to federal Medicaid funds. His interpretation of those conditions is not limited to Minnesota's state plan. He also approved similar spousal recovery provisions in four other state plans. In addition, the Secretary's interpretation will be applied if and when other states elect to include spousal recovery.

2. The Secretary's interpretation and the North Dakota Supreme Court's holding are both supported by the statute's plain language. Respondent's contention that the decision below is consistent with the plain language ignores the same important word that

the Minnesota Supreme Court completely ignored: "assets."

Section 1396p(b)(4)(B) provides that states may seek recovery from any other property and "assets" that may not be part of a state-defined probate estate. Indeed, states are expressly allowed to provide for recovery from "any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death." 42 U.S.C. § 1396p(b)(4)(B) (2000 & Supp. V 2005) (emphasis added). At the same time Congress enacted that provision, it declared that "assets," as used in section 1396p, "includes all income and resources of the individual *and of the individual's spouse*." 42 U.S.C. § 1396p(e)(1) (2000 & Supp. V 2005) (emphasis added); *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, § 13611(c) (adding definition of "assets") and § 13612(c) (adding the allowance for states to recover from "any . . . other assets"); 107 Stat. 312, 626, 628 (1993). Therefore, when Congress referred to "any . . . other assets," it intended to include those of a spouse in addition to those of the individual Medicaid recipient.

Respondent's claim that the court below rejected Petitioner's argument regarding "assets" is incorrect. Br. in Opp. 13. The Minnesota Supreme Court *never addressed* the role of the definitional statute, let alone rejected its implications. *See* Pet. App. 1a-45a.

3. Respondent incorrectly asserts that the decision below is supported by earlier decisions by the Illinois

Supreme Court and the Wisconsin Court of Appeals. Br. in Opp. 7, 16-18. Those courts, however, never reached the issue presented here about the scope of recovery. Rather, unlike the Minnesota Supreme Court, they held that federal law prohibits all spousal recovery claims. *Hines v. Dep't of Pub. Aid*, 850 N.E.2d 148, 153 (Ill. 2006); *In re Estate of Budney*, 541 N.W.2d 245, 246 (Wis. Ct. App. 1995). The Illinois and Wisconsin courts thus never considered what, if any, limitations federal law imposed on the scope of recovery.

4. Respondent wrongly suggests that the Court would need to address a state property law question if it granted certiorari. *See* Br. in Opp. 14. The issue raised by the petition regarding spousal recovery is purely a question of federal law; whether Medicaid law limits the scope of spousal recovery.

5. Finally, Respondent erroneously asserts that Petitioner required the recipient spouse in this case to transfer her interest in the home to the nonrecipient spouse. Br. in Opp. 6. Minnesota does not require such a transfer. *See* Minnesota Dep't of Human Services, Health Care Programs Manual, § 19.25.15.05 (instructing county personnel to exclude homestead property from Medicaid eligibility calculations if the long-term care resident's spouse continues to resides in the home) *available at* http://hcopub.dhs.state.mn.us/hcpmstd/19_25_15_05.htm (2008). Indeed, there

was no need for a transfer in this case other than to shelter the asset from future recovery.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Medicaid program, 42 U.S.C. 1396 *et seq.*, generally forbids participating States from recovering correctly paid benefits. The statute requires, however, that a State seek to recover the cost of nursing home services paid on behalf of an individual over the age of 55 from the individual's probate estate, after both the individual and her surviving spouse have died. The statute also permits (but does not require) a State to recover from "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. 1396p(b)(4)(B).

The question presented is whether, under Section 1396p(b)(4)(B), a State that seeks to recover correctly paid benefits from the estate of the recipient's surviving spouse is limited to recovering the value of assets in which the recipient had a legal interest at the time of her death.

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In the Supreme Court of the United States

No. 08-603

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT, ET AL., PETITIONERS

v.

MICHAEL F. BARG

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Medicaid program, established in 1965 in Title XIX of the Social Security Act (Medicaid Act), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program under which the federal government provides funding to States to provide medical assistance to eligible needy persons. *Harris* v. *McRae*, 448 U.S. 297, 301 (1980).

To participate in the Medicaid program, a State must develop a plan specifying, among other things, the categories of individuals who will receive medical assistance

under the plan and the specific kinds of medical care and services that will be covered. 42 U.S.C. 1396a. State Medicaid plans are reviewed by the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration) in the Department of Health and Human Services (HHS). 42 U.S.C. 1396; see 66 Fed. Reg. 35,437 (2001). If CMS approves a State's plan, the State is thereafter eligible for federal reimbursement for a specified percentage of the amounts "expended * * * as medical assistance under the State plan." 42 U.S.C. 1396b(a)(1), 1396d(b).

b. The Medicaid Act requires participating States to provide Medicaid benefits to the "categorically needy," that is, those persons eligible for financial assistance under specified federal programs. *Atkins* v. *Rivera*, 477 U.S. 154, 157 (1986); see 42 U.S.C. 1396a(a)(10)(A)(i)(IV), (VI) and (VII).

The Act also permits States to extend benefits to the "medically needy," that is, "persons lacking the ability to pay for medical expenses, but with incomes too large to qualify for categorical assistance." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 37 (1981); see 42 U.S.C. 1396a(a)(10)(C). To qualify as medically needy, a person may have income no higher than a defined threshold and may own assets of no more than a defined value. If the assets of a Medicaid applicant exceed the qualifying threshold, she must "spend down" her assets until they are at or below the qualifying threshold. See 42 U.S.C. 1396a(a)(17).

When a married person is institutionalized in a nursing home or other facility, the Medicaid Act considers the assets of both the institutionalized spouse and the non-institutionalized, or "community," spouse in determining the applicant's eligibility for benefits. 42 U.S.C.

1396r-5(c). To prevent the community spouse from being impoverished as a result of a required spend-down of assets, the statute exempts certain assets, such as the couple's home and an automobile, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain a certain level of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). See *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 480 (2002) (anti-impoverishment provisions are intended to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance"). Furthermore, although the Medicaid Act generally forbids a Medicaid applicant or her spouse from transferring assets at below market value in order to become eligible for benefits, 42 U.S.C. 1396p(c)(1)(A), the statute expressly permits the applicant to transfer assets, including an interest in the homestead, to the community spouse, 42 U.S.C. 1396p(c)(2). Once the institutionalized spouse is determined to be eligible for benefits, the statute provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4).

c. As a general rule, the Medicaid Act forbids States from seeking recovery of Medicaid benefits that were correctly paid. 42 U.S.C. 1396p(b)(1); see also 42 U.S.C. 1396a(a)(18). The statute provides an exception, however, for recovery from the estates of certain institutionalized and older beneficiaries:

Before 1993, the Medicaid Act's recovery provision permitted, but did not require, States to recover benefits paid on behalf of certain individuals, from the individuals' estates. 42 U.S.C. 1396p(b)(1)(B) (1988). In 1993,

Congress amended Section 1396p to require States to recover correctly paid benefits in certain circumstances. Omnibus Reconciliation Act of 1993 (OBRA 1993), Pub. L. No. 103-66, § 13612, 107 Stat. 627. As amended, the Act's estate-recovery provision requires States to seek recovery in the case of an individual who was permanently institutionalized, 42 U.S.C. 1396p(b)(1)(A), and in the case of a person who received, at age 55 or thereafter, nursing facility services, home and community-based services, or related hospital and prescription drug services, 42 U.S.C. 1396p(b)(1)(B). In addition, a State has the option to seek recovery of the cost of other items or services paid on behalf of individuals over the age of 55. *Ibid.* The recovery "may be made only after the death of the individual's surviving spouse, if any," and only at a time when the individual has no surviving children under the age of 21 or children who are blind or disabled. 42 U.S.C. 1396p(b)(2) and (2)(A). Such recovery may be waived in cases where it "would work an undue hardship." 42 U.S.C. 1396p(b)(3).

The statute provides for recovery of the cost of benefits paid on behalf of an individual over the age of 55 from "the individual's estate." 42 U.S.C. 1396p(b)(1)(B). The term "estate," for those purposes, "shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law." 42 U.S.C. 1396p(b)(4)(A). The statute further provides that an individual's "estate"

> may include, at the option of the State * * *, any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint ten-

> ancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. 1396p(b)(4)(B).

2. Since 1987, Minnesota law has provided for recovery of Medicaid benefits from the estate of a recipient's surviving spouse, as well as from the estate of a recipient. Act of June 12, 1987, ch. 403, art. 2, § 82 (Minn. Stat. Ann. § 256B.15 (2007)). Minnesota's estate-recovery law provides that "[a] claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn. Stat. Ann. § 256B.15, subd. 2 (2007).

3. In 2004, petitioner filed a claim against the estate of Francis Barg, in which he sought recovery of Medicaid benefits paid on behalf of Mr. Barg's predeceased spouse, Dolores Barg. Pet. App. 4a.[1]

a. During their marriage, the Bargs purchased real property in Princeton, Minnesota, to which they took title as joint tenants. In 2001, Ms. Barg entered a nursing home, and shortly thereafter applied for, and received, long-term Medicaid benefits. Pet. App. 2a-3a. Ms. Barg subsequently transferred her joint tenancy interest in the homestead property to Mr. Barg. At the time of the transfer, the assessed value of the property was $120,800. Ms. Barg also terminated her ownership interest in certificates of deposit the couple had held jointly. *Id.* at 3a-4a.

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[1] On March 2, 2009, this Court granted the State of Minnesota's conditional motion to intervene as a party aligned with petitioner Vos. All references in this brief to "petitioner" refer to petitioner Vos.

Ms. Barg died in 2004, having received a total of $108,413.53 in medical-assistance benefits through the state Medicaid program. Mr. Barg died five months later. Pet. App. 4a.

b. In his claim against Mr. Barg's estate, petitioner sought to recover the full amount of Medicaid benefits paid on behalf of Ms. Barg. Pet. App. 4a. Respondent, who is the representative of Mr. Barg's estate, allowed $63,880 as a claim against the estate, but disallowed $44,533.53. *Ibid.*[2]

Petitioner filed a claim-allowance petition in state court. The district court upheld the partial disallowance. Pet. App. 46a-51a. The court relied on the Minnesota Court of Appeals' decision in *In re Estate of Gullberg*, 652 N.W.2d 709 (2002), which held that Minnesota's estate-recovery law is preempted insofar as it permits recovery up "to the value of the assets of the estate that were marital property" at any point in the marriage, because 42 U.S.C. 1396p(b)(2)(B) permits recovery only "to the extent of" the Medicaid recipient's interest at the time of death. *Gullberg*, 652 N.W.2d at 714. The court concluded that, at time of her death, Ms. Barg's interest in the assets of Mr. Barg's estate that were marital property, including a life-estate interest in the homestead and a personal property allowance, totaled $63,880. Pet. App. 50a-51a.

c. The Minnesota Court of Appeals reversed and remanded for recalculation of petitioner's allowable claim. Pet. App. 52a-64a. Like the district court, the

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[2] Respondent's partial allowance of $63,880 apparently rested on the premise that Ms. Barg (1) had a one-half interest in the homestead, valued at $58,880, at the time of her death, despite the inter vivos transfer, and (2) was entitled to a personal property allowance in the amount of $5000. See Pet. App. 49a.

court of appeals concluded that, under federal law, the claim was necessarily limited to the value of Ms. Barg's interest in specified assets at the time of her death. *Id.* at 58a (citing *Gullberg*, 652 N.W.2d at 714). The court of appeals concluded, however, that Ms. Barg's interest in the homestead at the time of her death was a joint tenancy interest, valued as a one-half interest in the property's value of $120,800, or $60,400. *Id.* at 62a.

d. The Minnesota Supreme Court affirmed in part and reversed in part, concluding that petitioner was not entitled to full recovery from Mr. Barg's estate. Pet. App. 1a-45a.

As an initial matter, the court rejected respondent's contention that federal law completely preempts Minnesota's estate-recovery law insofar as it permits recovery from the estate of the Medicaid recipient's surviving spouse. Pet. App. 19a-30a. The court concluded that allowing recovery from a surviving spouse's estate is consistent with both the Act's preclusion of recovery from the Medicaid recipient's estate until after the death of a surviving spouse, 42 U.S.C. 1396p(b)(2)(A), as well as the purposes of the Medicaid Act's recovery provisions. Pet. App. 29a.

The court concluded, however, that federal law limits the scope of recovery against a surviving spouse's estate to the value of assets in which the recipient spouse had an interest "at the time of death," 42 U.S.C. 1396p(b)(4)(B), and thereby preempts Minnesota's estate-recovery law insofar as it permits the State to reach any other assets "that were marital property or jointly owned property *at any time during the marriage*." Pet. App. 31a (quoting Minn. Stat. Ann. § 256B.15, subd. 2 (2007)); see *id.* at 30a-37a.

The court further concluded that Ms. Barg did not have any interest in the homestead or bank accounts at the time of her death, because she had transferred her interest in those assets to Mr. Barg before she died. The court therefore held that petitioner had no legal entitlement to satisfaction of the State's claim from those assets. Pet. App. 37a-43a. But because respondent had partially allowed petitioner's claim, and never challenged the district court's award of that partial allowance of $63,880, the Minnesota Supreme Court held that petitioner could recover that amount. *Id.* at 43a-45a.

DISCUSSION

The Minnesota Supreme Court's decision is correct and does not warrant further review. The federal Medicaid Act permits recovery of correctly paid benefits from the estate of the recipient's surviving spouse, but limits that recovery to the value of assets in which the recipient had a legal interest at the time of her death.

Although the result in this case differs from the result in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000), the difference may not reflect a disagreement about the meaning of federal Medicaid law, but only divergent conclusions about when, under state law, an individual retains a legal interest in assets conveyed to a spouse. The petition for a writ of certiorari should be denied.

A. The Decision Of The Minnesota Supreme Court Is Correct

1. The Minnesota Supreme Court correctly concluded that the Medicaid Act forbids petitioner from seeking to recover correctly paid benefits from assets in which the Medicaid recipient had no legal interest at the time of her death.

Under the Medicaid Act, a State generally may not seek to recover correctly paid Medicaid benefits. 42 U.S.C. 1396p(b)(1). The Act provides, however, that a State (1) *must* seek recovery of nursing home and related benefits paid on behalf of an individual over the age of 55 from "the individual's estate" as defined by state probate law; and (2) *may*, at its option, define "the individual's estate" more broadly to include any "assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. 1396p(b)(1)(B), (b)(4)(A) and (B). Thus, the Medicaid Act, which permits recovery only after the death of the recipient's surviving spouse, 42 U.S.C. 1396p(b)(2), authorizes a State to file a reimbursement claim against the surviving spouse's estate, up to the value of any assets in which the Medicaid recipient had a legal interest at the time of her death.

The Minnesota estate-recovery law exceeds the scope of that authorization. It permits the State to recover from a surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*," Minn. Stat. Ann. § 256B.15, subd. 2 (2007) (emphasis added), without regard to whether the recipient retained an interest in the assets at the time of her death. Because a State may not recover correctly paid Medicaid benefits except to the extent authorized by federal law, see 42 U.S.C. 1396p(b)(1), Minnesota's statute conflicts with federal law and is therefore preempted. See *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-282 (1987).

2. Petitioner argues (Pet. 25-28) that the text of the Medicaid Act imposes no limit on permissible recovery from the estate of the Medicaid recipient's surviving spouse, because the Act defines the term "assets" to include "all income and resources of the individual and of the individual's spouse." 42 U.S.C. 1396p(h)(1). According to petitioner, "[b]y including resources of both 'the individual' and 'of the individual's spouse' in the meaning of 'assets,' Congress clearly intended that the spouse's resources fall within the scope of § 1396p(b)(4)(B)." Pet. 27.

Petitioner is incorrect. Although the general statutory definition of "assets" does encompass resources of both "the individual" (*i.e.*, the Medicaid recipient) and "the individual's spouse," the particular provision of the Medicaid Act at issue here refers specifically to any "assets in which *the individual* had any legal title or interest at the time of death." 42 U.S.C. 1396p(b)(4)(B) (emphasis added). Petitioner's argument finds it necessary to rewrite that clause to read "'any * * * assets in which [*either or both the individual and the individual's spouse*] had any legal title or interest.'" Pet. 26 (brackets and asteriks in original) (emphasis added). But this editing does nothing less than make the statute say the opposite of what it says. The plain language of the operative provision of the Act refutes petitioner's reading.[3]

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[3] In describing the operation of the amended estate-recovery provision, the legislative history of the 1993 amendments also focused on the assets of the individual who had received Medicaid benefits, rather than the resources of both the individual and his or her spouse. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 835 (1993) ("At the option of the State, the estate against [which] * * * recovery is sought may include any real or personal property or other assets in which *the*

3. Petitioner's reading of the Medicaid Act also finds little support in the Act's other provisions concerning the treatment of spousal assets. See Pet. 27-28. As petitioner notes, the Medicaid Act generally considers the community spouse's assets for purposes of determining whether an institutionalized individual is eligible to receive benefits. But the Act also exempts certain property, such as the couple's home, from consideration, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain certain amounts of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). Moreover, once the institutionalized spouse is determined to be eligible for benefits, the Medicaid Act provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4). The Medicaid Act, in short, imposes significant limitations on petitioner's asserted principle that "spouses are expected to support each other." Pet. 27. To read Section 1396p(b)(4)(B) in accordance with its plain terms thus is consistent with the broader statutory scheme.

4. Because Section 1396p(b) leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death, the presumption against preemption does not come into play, Pet. 28 (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996))—even assuming, arguendo, that this presumption has force in the context of a comprehensive federal-state cooperative program like Medicaid in which the State's program is sub-

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beneficiary had any legal title or interest at the time of death, including the home.") (emphasis added).

ject to federal approval. And for similar reasons, petitioner's suggestion that the decision below improperly enforces against the State "[a]n ambiguous condition" on the acceptance of federal funds under Spending Clause legislation lacks any merit. Pet. 28 n.8 (citing *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006)).

Petitioner also errs (Pet. 20-23, 28 n.8) in asserting that the Minnesota Supreme Court's interpretation of Section 1396p(b)(4)(B) is inconsistent with the interpretation of the responsible federal agency. HHS has neither promulgated regulations nor issued guidance interpreting Section 1396p(b)(4)(B) to authorize the kind of estate recovery that petitioner urges in this case. To be sure, CMS in 2007 approved Minnesota's state plan amendment incorporating its statutory spousal recovery provisions. See Pet. App. 89a-93a. But CMS's approval is not the equivalent of binding interpretive guidance. Cf. 42 C.F.R. 430.16(a)(1) (a state plan or plan amendment is deemed approved if CMS does not act within 90 days after submission). Moreover, CMS's approval followed binding judicial decisions in Minnesota's own courts interpreting the Medicaid Act to limit recovery to assets in which the Medicaid recipient had an interest at time of death. See, *e.g.*, *In re Estate of Gullberg*, 652 N.W.2d 709, 714 (Minn. Ct. App. 2002). As set forth above in this brief, see p. 9, *supra*, HHS also interprets the Medicaid Act to limit recovery in that manner.

B. The Decision Below Does Not Warrant Further Review

1. Petitioner contends (Pet. 24-25) that review is warranted to resolve a conflict between the decision below and the North Dakota Supreme Court's decision in

Wirtz, *supra*.[4] In *Wirtz*, much as in this case, a Medicaid recipient had transferred assets to his spouse before his death, and the State sought to recover the cost of the Medicaid benefits from the spouse's estate after her death. The court held that the State was permitted under 42 U.S.C. 1396p(b)(4)(B) to recover the value of any assets "in which the deceased recipient once held an interest," including assets conveyed to his spouse before his death. *Wirtz*, 607 N.W.2d at 886.

But the different results in this case and in *Wirtz* may not reflect a disagreement about the meaning of federal Medicaid law. Notably, the North Dakota Supreme Court, like the Minnesota Supreme Court, stated that the State "[could] assert a claim against real or personal

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[4] As the Minnesota Supreme Court noted (Pet. App. 21a-22a), two other state courts have concluded that Section 1396p(b) authorizes recovery only from the estate of a Medicaid recipient, and not from the estate of his or her spouse. See *Hines* v. *Department of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006); *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995). But those decisions and the decision below are not in conflict. Both *Hines* and *Budney* are consistent with the principle that a State may recover from the estate of a Medicaid recipient's surviving spouse if it exercises its option under Section 1396p(b)(4)(B) to define the individual's estate more broadly than it is defined under state probate law. See *Hines*, 850 N.E.2d at 153-154 (explaining that the state legislature could have defined the recipient's estate in such a way as to provide for recovery of certain assets from the estate of his surviving spouse, but had chosen not to do so); *Budney*, 541 N.W.2d at 246 & n.2 (holding that a state statute authorizing full recovery from a surviving spouse's estate exceeded the State's authority under 42 U.S.C. 1396p(b), without considering whether it would have been permissible for the State to recover from the surviving spouse's estate the value of assets in which the recipient had an interest at the time of death). Respondent here, in any event, does not challenge the Minnesota Supreme Court's conclusion that a State is permitted to recover from the estate of a surviving spouse in some circumstances. See Br. in Opp. 6, 8-9, 19.

property, and other assets in which [the recipient] had any legal title or other interest *at his death*." *Wirtz*, 607 N.W.2d at 885 (emphasis added); see also *ibid.* ("Our inquiry * * * is * * * whether [the recipient] had 'real and personal property and other assets in which [he] had any legal title or interest *at the time of death*.") (emphasis added). Although its reasoning is not entirely clear, the court in *Wirtz* appeared to conclude that the recipient in that case, despite formal conveyance of certain assets before death, retained an interest in the relevant property until his death, when the interest was conveyed to his spouse through "other arrangement." 607 N.W.2d at 885 (quoting 42 U.S.C. 1396p(b)(4)(B)). The court did not elaborate on the nature of that interest, although it referred to the State's argument that the recipient had retained a "marital or equitable interest" in the assets at the time of his death, *id.* at 883, and noted that other courts had interpreted Section 1396p(b)(4)(B) to reach state-law community-property and homestead interests, *id.* at 885.

The different results reached by the North Dakota Supreme Court and the court below on similar facts thus may reflect not conflicting interpretations of federal Medicaid law, but only different views of when, under state law, a spouse retains a legal interest in property conveyed to his or her spouse. Compare *Wirtz*, 607 N.W.2d at 885-886, with Pet. App. 38a-40a (concluding that, after Ms. Barg transferred her interest in the homestead and bank accounts, she no longer had a legal interest that could have been conveyed to Mr. Barg upon her death), and *id.* at 40a (noting that Minnesota law "makes no reference to * * * re-defining the probate estate to include all marital property, even property transferred prior to death").

Even if the decisions in *Wirtz* and this case do reflect a disagreement as to proper interpretation of the Medicaid Act, this Court's review would not be warranted. The Minnesota Supreme Court's interpretation of federal law is correct, and to date, only the North Dakota Supreme Court has allowed Medicaid recovery following an inter vivos transfer of assets between spouses. Assuming arguendo that the North Dakota Supreme Court misunderstood federal Medicaid law, rather than simply applied a peculiar feature of its own property law, the North Dakota court has not had an opportunity to consider HHS's interpretation, and the conflict may work itself out as the issue is further addressed in the lower courts.

2. Although petitioner (Pet. 31-33) is correct that estate-recovery efforts are important to the Medicaid program, questions concerning the scope of the Act's estate-recovery provisions have not arisen frequently, and relatively few States have opted to seek estate recovery to the maximum extent permitted by federal law. See Office of Assistant Secretary for Policy & Evaluation, HHS, *Policy Br. No. 6, Medicaid Estate Recovery Collections* tbl. 4 (Sept. 2005) (only nine States make maximum use of federal policy options); see also Pet. 31.

Moreover, although the federal Medicaid Act limits estate recovery to those assets in which the Medicaid recipient had a legal interest at the time of her death, the nature and extent of such interests remain largely the domain of state law. Notably, Minnesota's Governor has proposed redefining marital property interests to permit recovery of medical assistance from the estate of the later-surviving spouse in this context. See *Governor's Recommendation, Minnesota State Budget, 2010-11 Biennial Budget, Human Services Dep't* 132 (Jan. 27,

2009). That proposal has not become law, nor has it been reviewed by the Secretary of HHS. The proposal, however, suggests that Minnesota may be able to work toward greater asset recovery consistent with the clear terms of federal Medicaid law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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